

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G. (No. 2)

v.

CTBTO PrepCom
(Application for execution)

121st Session

Judgment No. 3565

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3162 filed by Mr H. C. G. on 6 June 2013 and corrected on 13 August, the reply of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) of 31 October 2013, the complainant’s rejoinder of 17 January 2014 and the Commission’s surrejoinder of 27 March 2014;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

CONSIDERATIONS

1. In Judgment 3162 delivered on 6 February 2013, in addition to awarding the complainant moral damages and costs, the Tribunal ordered the Commission to pay the complainant “material damages in an amount equivalent to the salary, allowances and other benefits that he would have received from 13 July 2010 to 13 July 2013 save for home leave and related allowances, less the complainant’s net

earnings from other sources during that period”. As well, the Tribunal ordered the Commission “to remove and destroy any adverse material from the complainant’s personnel file”. The complainant applies for execution of this judgment.

2. The main dispute between the parties is whether, as the Commission contends, the amount of its contributions to the Provident Fund for the complainant must be “offset” by any contributions paid into the United Nations Joint Staff Pension Fund (UNJSPF) on the complainant’s behalf by the International Atomic Energy Agency (IAEA), which recruited him shortly after he left the Commission. In summary, the Commission takes the position that as the Provident Fund forms part of its social security package for staff members and given the similarities between the UNJSPF and the Provident Fund and that the latter is designed to be an equivalent of the UNJSPF for its staff members, it follows that the amount it contributed to the Provident Fund on behalf of the complainant should be “offset” by the amount the IAEA contributed to the UNJSPF on his behalf. In the Commission’s view, to do the contrary would be to place the complainant in a better financial position than that in which he would have otherwise been.

3. The Commission adds that based on the Tribunal’s rulings in Judgments 2718 and 2679, the IAEA’s contributions to the UNJSPF should be included in the calculation of the complainant’s “net earnings”. Citing Judgment 2718, under 4, the Commission submits that “[a]ccording to the Tribunal’s established case law, the word ‘earnings’ should include the receipt of any valuable item, for example, a car”. As to Judgment 2679, the Commission interprets the decision as, in effect, stating that since “an award of ‘salary and other financial benefits’ should include pension contributions that would otherwise have been paid”, the offsetting amount should, therefore, also include the pension fund contributions even though it was a different type of pension fund.

4. The Commission's reliance on these two cases is misplaced. Judgment 2718 dealt with an application for interpretation of an earlier judgment in which the complainant was awarded "the amounts of salary and related emoluments that he would have received" for a certain period and was required to give credit for any "earnings" during that period. The issue was whether a car the complainant had received for services rendered came within the meaning of "earnings" for the purpose of determining the amount of credit, if any, that should be taken into account in the calculation of the material damages. In concluding that the complainant had to give credit for the value of the car he received, the Tribunal stated that the "word 'earnings' used by the Tribunal in its [earlier] judgment is apt to include the agreed receipt of a valuable item as compensation for the provision of services". The only finding made was that "earnings" could include non-monetary forms of compensation. More importantly, it did not deal with the meaning of "net earnings".

5. Judgment 2679 concerned the interpretation of the meaning of an award "of all salary and other financial benefits to which [the complainant] would have been entitled" had the complainant's contract been extended for two years "net of any compensation earned during the same period". The decision does not support the proposition advanced. The Tribunal held that "compensation earned", considered in the context of the meaning of "salary and other financial benefits", clearly included health insurance and pension contributions that would otherwise have been paid. Thus, it did not just mean net salary but also included other emoluments, including health insurance and pension fund contributions.

6. Returning to the present case, the calculation of the amount due for the material damages awarded to the complainant involves two separate calculations. The first is the calculation of the amount due by the Commission for the equivalent of the "salary, allowances and other benefits" the complainant would have received during the relevant time frame. The second is the calculation of the amount of the complainant's "net earnings" during the relevant period for which he

must give credit. Leaving aside for the moment the complainant's education grant claim, there is no dispute between the parties regarding the amount payable for the salary, allowances and other benefits. It is evident from the Commission's own calculations that it does not dispute that its contributions to the Provident Fund come within this part of the material damages award. However, without more, it does not follow that the Commission's contributions to the Provident Fund should be offset by the IAEA's contributions to the UNJSPF. Even if it is accepted that the Provident Fund is a type of pension plan, which is not accepted, the only offset provided in the material damages award is for "net earnings" during the relevant period. Thus, the only remaining question is whether the IAEA's contributions to the UNJSPF come within the meaning of "net earnings".

7. Net earnings refer to the earnings remaining after all necessary deductions from the gross earnings for a pay period. In fact, as in this case, the employer pension contribution is generally not shown on the employee payslip. Although in the circumstances a consideration of the Commission's argument that the Provident Fund is the equivalent of a pension fund is unnecessary, for the sake of completeness it is observed that the Charter of the Provident Fund itself makes it clear in Article 2 that the benefit provided to each member upon her/his separation from the Commission is a "salary benefit in the form of a lump sum".

8. Turning to the complainant's claim for the payment of the education grant, as he has not submitted any documentation to substantiate "the admissible education expenses actually incurred" as required under Staff Regulation 3.2(a), this claim must fail. The complainant's claim for moral damages on account of the delay in the execution of the judgment and for the Commission's breach of its obligation to act in good faith also fails. The judgment was delivered on 6 February 2013. Given that the Commission did not receive all of the information necessary to determine the amount of the complainant's paid and anticipated "net earnings" for the relevant period until 13 March and the dispute between the parties concerning the calculation of the net earnings, the payment made by the Commission on 29 April 2013

on the agreement that the amount in dispute would be referred to the Tribunal does not amount to inordinate delay warranting an award of moral damages. Additionally, the complainant overstates the request for confirmation concerning the correctness of the calculation. It does not show a lack of good faith on the part of the Commission.

9. Accordingly, the Commission will be ordered to fully execute Judgment 3162 within 30 days of the public delivery of this judgment and to pay the complainant 86,481.35 euros together with interest thereon at the rate of 5 per cent per annum from 30 April 2013 to the date of payment. The amount of 86,481.35 euros being the salary, allowances and other benefits payable by the Commission in the amount of 407,198.98 euros less the complainant's net earnings from the IAEA in the amount of 236,886.62 euros and the amount of 83,831.01 euros, which has already been paid by the Commission. The complainant is also entitled to costs in the amount of 7,500 euros.

10. Lastly, the Commission, under the signature of the Executive Secretary, will be ordered to confirm in writing to the complainant that all adverse materials in the complainant's personnel file have been removed and destroyed and the date on which this was done.

DECISION

For the above reasons,

1. The Commission shall within 30 days of the public delivery of this judgment pay the complainant 86,481.35 euros together with interest thereon at the rate of 5 per cent per annum from 30 April 2013 to the date of payment.
2. The Commission, under the signature of the Executive Secretary, shall confirm in writing to the complainant that all adverse materials in the complainant's personnel file have been removed and destroyed and the date on which this was done.

3. The Commission shall pay to the complainant costs in the amount of 7,500 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 October 2015 Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ